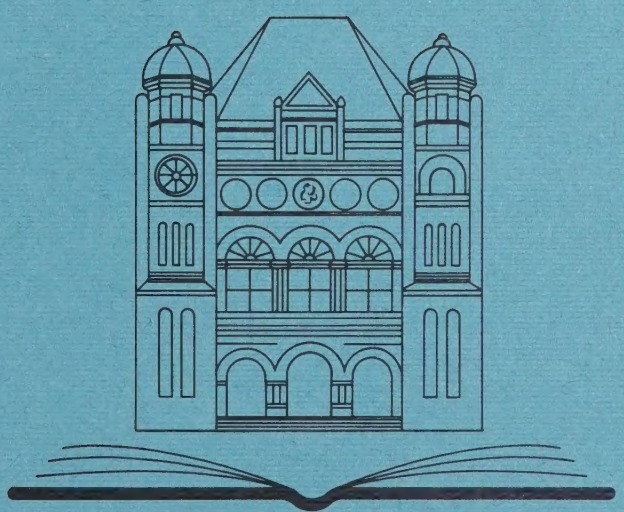
AN OVERVIEW OF THE SENATE: ITS PURPOSES, STRUCTURE, AND OPERATION

With an Update, October 1992, taking account of the Charlottetown Agreement

CURRENT ISSUE PAPER 112



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ISSN 0835-0299

AN OVERVIEW OF THE SENATE: ITS PURPOSES, STRUCTURE, AND OPERATION

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November 1990
With update added October 1992

TABLE OF CONTENTS

THE ISSUE

The Constitution has stated, since Confederation, that:

> There shall be One Parliament for Canada, consisting of the Queen, *an Upper House styled the Senate*, and the House of Commons.[1] [emphasis added]

This paper focuses upon the purposes, structure, and operation of this "Upper House styled the Senate" -- a chamber which appears to be as controversial today as at any time in its history. Why was the Senate created as one of the three parts of Parliament? What constitutional provisions have governed its operation? What legislative role has it performed? In answering these questions, the intention is to provide an overview only. The overview incorporates the events which have been receiving so much coverage in the media lately, namely: the battle between the Senate and the House of Commons over the goods and services tax (GST); the increase in the size of the Senate by eight members; and the court challenges to these extra appointments. (Note: The paper covers events up to and including November 20, 1990.)

ORIGINAL PURPOSES OF THE SENATE

Provincial or Regional Interests

The most important original purpose of the Senate seems to have been the protection and representation, so far as federal legislation was concerned, of what Sir John A. Macdonald called "sectional interests." During the 1865 "Confederation Debates" in the Legislature of Canada, Macdonald commented:

> To the Upper House is to be confined the protection of sectional interests; therefore it is that the three great divisions are equally represented, for the purpose of defending such interests against the combinations of majorities in the Assembly.[2]

The reference to "sectional interests" included those interests peculiar to a region or to a linguistic or religious group. These interests have, at times, been denoted by the more familiar term "regional interests." As for the reference to the "three great divisions," Macdonald was speaking of Upper Canada, Lower Canada, and the Maritime Provinces.

The Constitution Act, 1867, formerly the British North America Act, implemented the principle of equality among regions (called "divisions"). A 72-member Senate was established on the following basis:

1.	Ontario		24
2.	Quebec		24
3.	Maritime Provinces		24
	Nova Scotia	12	
	New Brunswick	12	

This formula meant that both the less populous provinces and the predominantly French-speaking province of Quebec had some protection against the wishes of a simple majority of Canada's population, as reflected in decisions of the House of Commons. This protection may have been the key to federation. As George Brown, a father of Confederation from Upper Canada, said:

> Our Lower Canada friends have agreed to give us representation by population in the Lower House, on the express condition that they shall have equality in the Upper House. On no other condition could we have advanced a step . . .[3]

The Constitution Act further stipulated that the 24 Senators from Quebec had to reside or own property in particular districts. This requirement was designed to ensure that both the French-speaking Roman Catholic majority and the English-speaking Protestant minority had their fair share of representation in the Senate. Senators from Quebec must still meet this requirement.[4]

Counterweight to House of Commons

The other major role for the Senate was to foster political stability by acting as a counterweight to the popularly-elected House of Commons. This role was reflected in the way Senators were chosen. For instance, Senators were to be appointed -- not elected -- and they had to be at least 30 years of age. A member of the House of Commons, on the other hand, could be any age the electoral laws permitted.

This counterweight role and that of protecting and representing regional interests were to be carried out, in part, by the exercise of "sober sound thought" on legislation emanating from the Commons. Macdonald declared that:

> There would be no use of an Upper House if it did not exercise, when it thought proper, the right of opposing or amending or postponing the legislation of the Lower House. It would be no value whatever were it a mere chamber for registering the decrees of the Lower House. It must be an independent House, having a free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill-considered legislation which may come from that body . . .[5]

Property Interests

A less significant role for the Senate was the protection of property interests. Macdonald believed that:

> A large qualification should be necessary for membership of the Upper House, in order to represent the principle of property. The rights of the minority must be protected, and the rich are always fewer in number than the poor.[6]

Each Senator was required to own real property with a net value of $4,000 in the province to be represented. In addition, the Senator had to be worth $4,000 over and above all liabilities. In 1867, $4,000 was a substantial sum. Indeed, it was nearly seven times the annual indemnity of a member of the House of Commons in the first Parliament.[7]

These property qualifications remain unchanged.[8]

Primacy of House of Commons

Notwithstanding the purposes outlined above, the Senate was seen by the Fathers of Confederation as a "minor legislative body."[9] Although no legislation could become law without its concurrence, the Senate was an appointed rather than an elected body; it could not initiate money bills; and the Cabinet was not to be held responsible to it. These circumstances guaranteed the supremacy of the House of Commons. As explained by R. MacGregor Dawson in The Government of Canada:

> The Senate . . . was, of course, intended to be the minor legislative partner. This intention was placed beyond any possibility of doubt by three constitutional arrangements; two were stated in explicit form; the other, while no less clearly understood, rested on the established practice of the past. The British North America Act provided the explicit statements. Only the House of Commons was to be based on popular election; and while that alone gave the Commons the upper hand, the act added a further clause that the same body should also have the sole power to originate all bills for the raising or spending of money, a grant of power which clinched the matter. The third guarantee of the supremacy of the Commons was unwritten, but equally vital, namely, the constitutional understanding that the cabinet was to be held responsible to the lower and not to the upper House. Once these three fundamental propositions were enunciated, the general position of the two houses was permanently settled, although there was still room for development and adjustment within the areas and functions thus allocated.[10]

STRUCTURE AND OPERATION OF THE SENATE

Constitutional Provisions

Composition
(sections 21-22 and 26-28)*

As mentioned earlier, the Senate originally consisted of three divisions. In 1915 the Western Provinces, which were already represented in the Senate, were formally recognized as a separate division and allotted additional Senators. This amendment created a 96-member Senate with four divisions, which were equally represented as follows:

1.	Ontario		24
2.	Quebec		24
3.	Maritime Provinces		24
	Nova Scotia	10	
	New Brunswick	10	
	Prince Edward Island	4	
4.	Western Provinces		24
	British Columbia	6	
	Alberta	6	
	Saskatchewan	6	
	Manitoba	6	

The normal makeup of the four divisions has not changed since 1915. Neither Newfoundland, which was given six Senators in 1949 on joining Confederation, nor the Yukon and Northwest Territories, which were each given one Senator in 1975, form part of a division.

Thus, the normal composition of the Senate is 104 Senators. The Constitution further stipulates that at no time may membership exceed 112. How and when can the Senate be enlarged?

Enlargement of the Senate

By special direction of the Queen, four or eight members may be added to the Senate on condition that each of the four divisions is increased equally; however, if additional Senators are so appointed, vacancies cannot be filled until a division returns to its complement of 24.[11] This mechanism is the only "safety valve" provided in the Constitution for breaking a deadlock between the Houses. At the same time, it is designed in such a way as to limit the Cabinet's ability to "swamp" the Senate with

*All section references are to the Constitution Act, 1867, as amended, unless otherwise indicated.

appointees amenable only to its point of view. It had never been used until September 1990.

Six-and-a-half years after Confederation, Prime Minister Alexander Mackenzie had attempted to use it, but was unsuccessful. Concerned about a large Opposition majority in the Senate, Mackenzie (by means of his Cabinet) advised the Governor General to recommend to the Queen the appointment of six extra Senators. (At the time, three divisions were represented in the Senate; accordingly, the Senate could be expanded by either three or six members.) The Queen, on the advice of her British Ministers, refused. In order for the appointment power to be invoked, two conditions had to be satisfied: (1) the differences between the two Houses had to be so "serious and permanent" that the government could not be carried on without the intervention of the Sovereign; and (2) the addition of Senators "would supply an adequate remedy."[12]

By the 1960s, Frederick Kunz was writing in The Modern Senate of Canada that this special appointment power "would be ineffective in almost any conceivable circumstances" and had "long been considered obsolete."[13] However, in June 1990 Prime Minister Mulroney gave a very different assessment. When asked if he felt any temptation to use the power, he responded:

> Only if I have to. If I have to, I won't hesitate to use it. I will use every constitutional means to ensure that the supremacy of the elected House of Commons is maintained.[14]

Three months later, after a Senate committee recommended that the full Senate kill the government's planned goods and services tax, the Queen approved a request from Mulroney under section 26 to allow the appointment of eight extra Senators.[15] Referring to the determination of the Liberal majority in the Senate to defeat the tax, the Prime Minister stated:

> The Liberals in the Senate are using their majority in the unreformed Senate to frustrate the will of the accountable House of Commons. In these circumstances, the government has not only the right but the obligation to overcome the obstructionism of the Liberal majority in the Senate.
>
> . . . The issue [at stake here] is about parliamentary democracy and responsible government.[16]

The appointment of the eight Conservative Senators gave the government a plurality, but not a majority, of Senate seats as follows:

Progressive Conservative	54
Liberal	52
Independent	4
Independent-Liberal	1
Reform	1
Total	**112**

Allan MacEachen, the Liberal leader in the Senate, reacted to the news of the extra appointments with anger. Liberal Senators, he said, were "deeply outraged" over the expansion of the Senate. He defended their efforts to kill the GST, even though it had passed the House of Commons, saying that they were responding to the "deep, visceral hatred" of the tax by most Canadians:

> The Senate is acting in this case not in any willful way to show its authority or to deny the House of Commons . . . It is acting in response to what we believe is the will of the vast majority of Canadian people.[17]

The appointment of the eight Senators has become the subject of numerous court challenges. Separate actions have been launched by Liberal Senators, the Attorney General of British Columbia, Liberal Members of the Alberta Legislature, the Leader of the New Democratic Party of New Brunswick, and a lawyer in private practice in Guelph, Ontario.[18] The Ontario government has decided to intervene in the British Columbia case as well as in a reference by the Alberta government to the Alberta Court of Appeal which, unlike the other court actions, deals with the constitutionality of the GST itself.[19] The issues raised by the challenges to the Senate appointments overlap, although not completely.

One of the contentious issues is whether or not the appointments are contrary to section 51A of the Constitution Act, 1867. This section entitles a province "to a number of members in the House of Commons not less than the number of senators representing such province." It is alleged that the appointment of James Ross of New Brunswick as one of the eight new Senators contravenes section 51A by giving New Brunswick more Senators (11) than members of the House of Commons (10).

Two decisions have already come down on this issue; both are being appealed. In the actions involving the Liberal Senators and the Guelph lawyer, T. Sher Singh, Mr. Justice Nicholson McRae of the Ontario Court of Justice (General Division) ruled that there had been no violation of section 51A. The judgment held that the section entitled New Brunswick to a number of members in the House of Commons not less than the number of Senators *ordinarily* representing the province. This view was reinforced by the fact that the new Senators were "temporary"; their terms were not of shorter duration, but section 27 of the Constitution Act, 1867 did require that the extra positions not be filled as vacancies occurred until the number of Senators from a division returned to twenty-four.[20]

The judgment then stated that even if the appointment of Senator Ross resulted in New Brunswick being "entitled" to another Commons seat, his appointment would still not be unconstitutional. The entitlement was similar to that resulting from the death or resignation of a member, where the vacancy would be filled by a by-election. Providing for the entitlement was "a matter for Parliament."[21]

It was pointed out that any conclusion that the Commons was improperly constituted because of the Ross appointment "would result in the Court suspending or terminating the current legislative session."[22] However, the jurisdiction of the courts was limited:

> The court cannot assume jurisdiction to declare the House of Commons unable to pass legislation or transact business, in other words, to prorogue Parliament. The authority to prorogue Parliament rests with the Sovereign alone . . . .[23]

In the New Brunswick action, Mr. Justice Stevenson of the Court of Queen's Bench gave a different interpretation to section 51A. He decided that although the appointment of Senator Ross did not violate the section, New Brunswick was entitled to another member in the House of Commons. Part of the judgment reads:

> . . . section 51A makes no distinction between permanent and temporary increases in a province's representation in the Senate. It says "always" ["a province shall always be entitled"]. That covers any kind of increase.[24]

Stevenson felt that the situation called for the exercise of "political imagination and

ingenuity."[25] These qualities were needed in order to devise a method of giving New Brunswick the extra member without delay and without disrupting the continued representation of the Province in the Commons. If Parliament failed to promptly devise a method of creating and filling the eleventh seat, the court could be asked to do so. He continued:

> While the court cannot tell Parliament what to do, it is the guardian of the constitutional rights of citizens and will, if necessary, find a way to ensure that those rights are observed.[26]

Another issue before the courts is whether or not the differences between the Senate and the House of Commons must be of a particular character before extra Senators can be appointed. Thus, one of the questions before the British Columbia Court of Appeal is:

> 4. If there is legal authority to direct that members be added to the Senate, is the exercise of that authority limited by constitutional convention to circumstances where differences between the Senate and the House of Commons are of so serious and permanent a character that the Government cannot be carried on, and such differences are not susceptible to satisfactory adjustment by any other means?[27]

Appointment
(section 24)

Appointments to the Senate are made by the Governor General who, in practice, acts solely on the advice of the federal Cabinet. Under the Meech Lake Accord, these appointments were to be filled from names submitted by "the government of the province to which the vacancy relates."[28] The 1990 Constitutional Agreement would have permitted the territorial governments also to submit names.[29]

The Meech Lake "political accord" required the new mode of appointment to start immediately; it was not necessary to wait until the actual amendments were ratified and proclaimed into force. (Note: The Meech Lake Constitutional Accord consisted of three documents: (1) the political accord; (2) the motion for a resolution; and (3) the schedule to the resolution, which contained the text of the proposed amendments.) But how were provinces to select names for submission to the federal government? On this issue, the accord was silent. In 1989, Alberta decided to

organize an election for the purpose of yielding a name to fill a vacancy. The Province passed the Senatorial Selection Act[30] in August and in October a senatorial election was held in conjunction with the municipal elections. The election was won by the Reform Party candidate, Stan Waters. He was appointed to the Senate in June 1990 in the interval between that month's First Ministers' Meeting on the Constitution and the deadline for the passage of the Meech Lake Accord.[31]

In July 1990 British Columbia also passed a Senatorial Selection Act.[32] The British Columbia Act stipulates that a senatorial election will be held in conjunction with the next provincial election to fill any vacant Senate seats. Although the successful candidate(s) will not automatically become a Senator(s), Premier Vander Zalm has suggested to the Prime Minister "that he would undoubtedly want to appoint that person who happens to be the choice of the province, the people of the province."[33]

Section 24 of the Constitution Act, 1867 refers to the appointment of qualified "persons" to the Senate. It was not until 1929 that the Judicial Committee of the Privy Council in London held that the word "persons" in this section included women. In reaching this decision the Judicial Committee, which was the last court of appeal in Canadian cases, reversed a Supreme Court of Canada ruling which had equated "persons" with males.[34]

Qualifications
(sections 23 and 29-33)

Senators must be at least 30 years of age and must reside in the province for which they are appointed. If appointed before June 1965 (when compulsory retirement was enacted), they hold office for life. Otherwise, they must retire at age 75. As noted earlier, there is a property qualification of $4,000.

Vacancies may occur through death, retirement, resignation, or disqualification. One of the grounds for disqualification is the failure to attend a sitting of the Senate during two consecutive sessions. Two of the other grounds are being adjudged bankrupt and ceasing to meet the property and residence qualifications.

If a vacancy does occur, there is no requirement to fill it within a prescribed time period. In fact, in the recent past, individual seats have been left unfilled for as long as seven or eight years.[35]

Vacancies can only be filled by "fit and qualified" persons. In a case currently before the courts, it is being argued that former Nova Scotia Premier John Buchanan does not meet this qualification. At the time of his appointment, the Royal Canadian Mounted Police was conducting an investigation into allegations of wrongdoing by Buchanan and his government. It is the position of the applicant, T. Sher Singh, that as long as Buchanan is "under active police investigation for allegations which go to the crux of a person's integrity, he is not a suitable or appropriate person to be appointed as a Senator."[36] Singh contends that under the Constitution a person appointed to the Senate must not only be "fit" for the position, but also appear to the public to be "fit". He claims that the word "fit" was designed to ensure that first and foremost the integrity of the Upper House remained intact.[37]

Internal Procedures
(sections 34-36)

Unlike the Speaker of the House of the Commons, the Speaker of the Senate is appointed by the Governor General who acts on the advice of the Prime Minister.

Until Parliament provides otherwise, the quorum for doing business is fifteen, including the Speaker.[38]

Powers

The constitutional powers of the Senate are found in the Constitution Acts of 1867 and 1982. Under the Constitution Act, 1867, the Senate has the same powers as the House of Commons, with the exception of the introduction of money bills. No bill can become law without being passed in identical form by both Houses.

Section 53 states that tax or expenditure bills -- that is, money bills -- must originate in the House of Commons. This section, however, says nothing about whether the Senate can amend or delay such bills and the point has frequently been challenged. Since Confederation, the House of Commons has claimed a monopoly over all aspects of financial legislation. This claim has been rejected by the Senate, which has argued that if the Constitution had intended to limit the Senate's power to amend money bills, it would have said so. Furthermore, it has been argued that the Senate could not discharge its functions as a guardian of provincial or regional rights if it had no power

over money bills. The Senate, however, does not contend that it has the power to increase an expenditure or a tax. From time to time, the Commons has accepted Senate amendments to money bills, usually adding what has been termed a "futile claim" that the incident is not to be considered a precedent.[39]

In April 1990, the Speaker of the House of Commons considered the issue of the Senate's powers over money bills in the context of a disagreement between the two Houses with respect to Bill C-21. The Bill proposed, in part, to eliminate the federal government's funding of the unemployment insurance program; but Senate amendments sought to restore some of the funding. The Speaker held that it was "not within my power to rule on whether the Canadian Senate should have the constitutional right to restore charges when the Commons have decided otherwise."[40] The House as a whole had to ultimately make the decision to accept or reject amendments from the Senate.

Prior to the passage of the Constitution Act, 1982,[41] the Senate had an absolute veto over constitutional amendments. A constitutional resolution had to pass both Houses before proceeding to the Westminster Parliament for enactment. Section 47 of the 1982 Act replaced this absolute veto with a 180-day suspensive veto. Thus, the Senate can delay the passage of a constitutional resolution by 180 days and require the House of Commons to repass it.

In June 1988, the House of Commons invoked section 47 and overrode the amendments of the Senate to the Meech Lake Accord.[42]

Constitutional Amendment
(sections 38, 41, 42, and 44 of the Constitution Act, 1982)

An amendment to the Constitution in relation to:

- the method of selecting Senators;
- the number of members by which a province is entitled to be represented in the Senate;
- the powers of the Senate; and
- the residence qualifications of Senators

must be passed by the general amending formula, also known as the "7/50 formula." This formula requires approval of the amendment by the House of Commons and Senate (subject to the Commons override) and by the legislative assemblies of at least two-thirds of the provinces having at least 50% of the population of Canada (less that of the territories). Under the Meech Lake Accord, the above matters would have been subject to the unanimity amending formula found in the Constitution.[43] Whether or not Meech Lake's unanimity requirement would have hindered the prospects of Senate Reform was the subject of much controversy.

Other amendments to the Constitution in relation to the Senate can be made by Parliament alone. The Senate has an absolute veto over these amendments.

Senate's Legislative Role

Bills

Procedures

Government bills, private members' bills, and private bills may all be initiated in the Senate. In practice, however, few government bills are introduced in the second chamber. Key factors are the confidence which the government-of-the-day has in the Senate and the kinds of legislation which it wishes to enact. Controversial measures and matters with a high political profile are almost always introduced into the Commons first. Bills which are not especially controversial, but which are complex and could benefit from the detailed study of a Senate committee, may be initiated in the Senate.[44]

In 1971 the Senate adopted a practice known as the "pre-study" of legislation. This practice involved examining bills before they had been approved by the Commons. It has been said that, in addition to ensuring earlier Senate input into the legislative process, "pre-study" gave the Senate more time to scrutinize legislation without interfering unduly with the legislative timetable of the Commons. The practice, however, was dropped by Senator MacEachen following the change in government in 1984 and his appointment as Liberal leader in the Senate. It was MacEachen's view that the Senate had been established as a legislative body, not an advisory body. Its revising role was not performed properly if it acted prior to, or simultaneously, with the House of Commons.[45]

As mentioned earlier, all bills, no matter where initiated, must be passed by both the House of Commons and the Senate before becoming law. What if disagreements arise between the House and the Senate on amendments to a bill? The Senate, for example, may disagree with amendments made by the House to a bill originating in the Upper Chamber. Another possibility is the Senate insisting on amendments to a bill originating in the House -- amendments with which the House disagrees.

Standing Order 77 of the House of Commons and Rule 59 of the Senate provide two methods for dealing with such disagreements:

- by communicating the disagreements through "messages," which is normally the first recourse. Messages state the reasons for the disagreement; or
- by attempting to resolve them at a conference which may be a "free" conference.

The conference and the "free" conference are the two forms of meeting between representatives of the Senate and House of Commons to settle disagreements over amendments. The conference is a meeting at which a written message is delivered, usually without the exchange of a single word. A "free conference" is very different in that the participants attempt, by discussion, to effect an agreement between the two Houses.

While many messages pass between the House and the Senate, conferences between the two have been rare. None has been held since 1947 and only 16 are documented since 1903. The last 14 of these 16 conferences have been "free" conferences.[46]

Exercise of Powers

In Constitutional Law of Canada, Professor Peter Hogg writes:

> . . . it is accepted by opposition as well as government senators that the appointive nature of the Senate must necessarily make its role subordinate to the elective House. The result is that very few government bills are rejected or substantially amended by the Senate.[47]

But when are bills "rejected or substantially amended by the Senate"? This kind of question was addressed by Senator Eugene Forsey in January 1974. During a debate in

the Senate, he stressed that "there can be no question at all" that the Senate "has a right to amend any legislation from the other house that it sees fit to amend." Indeed, "it can reject any bill whatsoever, and it can go on doing it from now until Doomsday."[48] However, a general practice had developed whereby the Senate would reject a bill or insist on an amendment "only in rather unusual circumstances - circumstances of great seriousness."[49] Forsey elaborated:

> I would say that the Senate has a right to insist on an amendment or a right to throw out an amendment if the bill, or a clause in the bill, is really vicious; if it is, for example, a gross and flagrant invasion of the liberties of the subject, or a measure fatal or highly dangerous to the national existence.
>
> I would say that there is a similar warrant for us to exercise our rights to throw out a bill or amend a bill and insist on our amendment if there is a tremendous, widespread, furious outcry from a large section of the country against the measure.[50]

Forsey gave three examples of these "circumstances of great seriousness":

- In 1936, the Senate defeated a proposed amendment to the Constitution. The amendment dealt with provincial taxing powers and the power of Parliament to guarantee provincial debts. Objections were raised that the provinces might, in effect, be empowered to erect tariff barriers against each other.

- In 1961, the federal government introduced a bill in the House of Commons declaring vacant the Office of the Governor of the Bank of Canada. The Governor, James Coyne, had previously declined the government's request to resign.

  Coyne was unable to obtain a hearing before a Commons committee. The Senate, however, allowed him to appear before one of its committees. Having given his evidence, he resigned. "So the bill fell to the ground . . . "[51]

- Also in 1961, the government introduced an amendment to the Customs Act which allowed the Minister of National Revenue to make certain decisions without any right of appeal. The Senate insisted that the bill be amended to permit an appeal to the Tariff Board. The government rejected the amendment and the bill died.

Since 1984, the Senate has assumed a more active legislative role. For six years, a Conservative majority in the House of Commons existed alongside a Liberal majority

in the Senate. In an article reviewing the actions of the so-called "new Senate" during the 33rd Parliament (1984-1988), Peter Dobell of the Institute for Research on Public Policy pointed out that "the Senate slowed down or amended significantly a variety of bills from the Commons, some of major importance to the government."[52] It did not, however, actually vote to kill any bill.

Major government legislation amended by the Senate included bills on refugees (C-55), immigration (C-84), and copyright (C-60). In the case of the bill implementing the Free Trade Agreement between Canada and the United States (C-130), Liberal Senators allowed the bill to go forward to committee. As noted by Dobell, they immediately set up an extensive program of hearings which left no doubt in the government's mind that the bill would not be passed by the date agreed upon with the Americans. A lengthy delay would also have put major constraints on the government's choice of an election date. Dobell concluded that "in this instance, the Senate not only influenced the government's decision to call the election when it did, but even helped to determine the agenda of that election."[53]

During the 33rd Parliament, the contrasting approaches to the issue of an unelected chamber taking on an elected chamber were reflected in a debate on Bill C-22, the government's drug patent legislation. At the time of the debate, messages had twice been received from the Commons on the bill. Senator Duff Roblin argued that the principles of representative and responsible government came first. He acknowledged that the Senate had the legal capacity "to thwart or to deny the policies approved by the House of Commons"[54] and that the Senate should not act as a rubber stamp. "We have the right to propose amendments, to propose changes, and we do."[55] However, ultimately the will of the Commons had to prevail:

> . . . if the House of Commons, after two tries in this instance, decides that it will not accept the advice the Senate has given it, then I think our responsibility is discharged. We have done our duty.[56]

Senator Henry Hicks responded that the Senate had the right to participate in the process of changing laws and that this right did not in any way impinge upon the theories of responsible government. It was the duty of the Senate to consider legislation and to vote on it conscientiously, just as it was the duty of the House of Commons to do so. He explained:

> If the Senate should defeat this bill, it has no effect upon the rights of the present government to govern and to continue to govern. But it does deny the present government the right to change the laws in respect of our patent legislation - that is all.[57]

The active role of the Senate and the debate over the exercise of its powers have continued during the 34th Parliament. When Parliament adjourned in June 1990, the Senate, which still had a Liberal majority, had yet to pass three key government bills: Bill C-21 on unemployment insurance; Bill C-28, the "clawback" bill, which taxes back under certain conditions portions of old age pensions and family allowances; and Bill C-62, the proposed 7% goods and services tax. The Senate had proposed amendments to the first two bills and messages had been received from the Commons; as for Bill C-62, it had been referred to the Banking, Trade and Commerce Committee.[58]

When the Senate resumed sitting in September 1990, the Banking Committee recommended that the goods and services tax be killed. Formally, the Committee reported that Bill C-62 "should not be proceeded with further in the Senate."[59] Among the reasons given for the unacceptability of the bill were its technical flaws and the unfairness and complexity of the tax.

The day after the above report was tabled the Prime Minister, asserting the supremacy of the elected House of Commons, invoked section 26 of the Constitution Act, 1867 to appoint eight extra Senators. As noted earlier, this expansion of the Senate gave the Conservatives a plurality of Senate seats. (For a discussion of the Government's use of section 26, see pp. 6-9.)

Liberal Senators responded to the Government's strategy with a filibuster against the tax. Their protest received additional fuel when the Speaker allowed a vote on an adjournment motion to proceed while the Liberals were absent from the chamber and without their agreement. During this period, numerous accusations were made with the Prime Minister, for example, accusing Liberal Senators of "legislative terrorism" and Senator Allan MacEachen claiming that the Conservatives wished to "execute" the Canadian people by implementing the tax.[60]

After several days of negotiations, an agreement was reached which among other things set dates for final votes on three bills, all of which have since been passed: the bill revising the unemployment insurance system; the "clawback" bill; and the bill on the development of the Hibernia oil field off Newfoundland. A date was also set for a vote on the report of the Senate Banking Committee on the GST. That vote saw the Senate reject the Banking Committee report. The agreement did not fix a date for a final vote on the GST itself.[61]

Investigative Activities

The Senate performs an investigative function through Committee hearings on legislation and questions of public policy. Studies have been completed on such varied topics as land use, manpower and employment, the ageing of Canada's population, consumer credit and consumer prices, poverty, and the mass media. Many reports have received favorable comments. Indeed, work of Committees on the first four topics led to the Agricultural and Rural Development Act, the Department of Manpower and Immigration, a reduction in the qualifying age for old age security, and the Department of Consumer and Corporate Affairs.[62]

Notwithstanding the success of some Senate investigations, there is some debate as to whether or not royal commissions could investigate policy issues more effectively than Senate Committees.[63]

Cabinet Ministers

In the early years of Confederation the Senate was seen as a secondary, but nonetheless an alternative, source of Cabinet material. In Sir John A. Macdonald's first Cabinet, five ministers out of thirteen were Senators.

A general practice soon developed that no ministers in the Senate were heads of government departments. Norman Ward in Dawson's The Government of Canada explains:

> The primary reason given for this convention is that spending departments must have a minister in the House to defend departmental estimates, so that democratic control requires all these ministers to be in the representative body.[64]

As a result of this convention, a Prime Minister wishing to bring a person from outside into the Cabinet is more likely to have the person seek a seat in a by-election, than to appoint him or her to the Senate. It should be noted, however, that both the Clark and Trudeau governments relied on Senators to provide representation in Cabinet for regions which had few or no members in their Commons caucuses.[65]

The Leader of the Government in the Senate holds a full portfolio in his or her own right.

Senate Reform

Much of the criticism of the Senate has focused upon its inability to perform effectively the function described at the beginning of this paper -- the protection of regional interests in national decision-making. It has been argued by proponents of reform that the government in Ottawa is national in name only -- that, in practice, it is a regional government controlled by a majority resting in central Canada. David Elton of the Canada West Foundation explained to the Ontario Legislature's Select Committee on Constitutional and Intergovernmental Affairs:

> . . . that does not mean that it [the majority based in central Canada] does not deal with some of our problems some of the time in good ways. It does not mean that we always get the short end of the stick. It means that when it really counts, we will be asked to wait until next time.[66]

Elton identified the primary objective of Senate Reform as the restructuring of the political institutions of Canada in a meaningful way to reflect the concerns of all Canadians. If that restructuring favoured by Elton and others is to be carried out, there will have to be changes to some of the constitutional provisions discussed earlier. For proponents of reform, those changes are long overdue. As the Constitutional Committee heard:

> Western Canada and Atlantic Canada have been waiting for a century.[67]

(Note: Senate Reform is the subject of Current Issue Paper #113).

FOOTNOTES

[1]Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3, s. 17. This provision means that technically the term "MP" can extend either to a Senator or a member of the House of Commons.

[2]Parliamentary Debates on the subject of the Confederation of the British North American Provinces (Quebec: Hunter, Rose, 1865), p. 38. [Confederation Debates]

Information on the history and composition of the Senate was derived from several sources, apart from the Confederation Debates. They include, among others: Robert A. Mackay, The Unreformed Senate of Canada, rev. ed. (Toronto: McClelland and Stewart, 1963); F.A. Kunz, The Modern Senate of Canada, 1925 - 1963: A Re-appraisal (Toronto: University of Toronto Press, 1965); Canada, Parliament, Special Joint Committee of the Senate and of the House of Commons on Senate Reform, Report (Ottawa: Supply and Services Canada, 1984); and Alberta, Legislative Assembly, Select Special Committee on Senate Reform, Report: Strengthening Canada--Reform of Canada's Senate (Edmonton: Plains Publishing, 1985). The Alberta Report contains extensive background material prepared by the Legislative Research Services Section of the Alberta Legislature Library.

[3]Confederation Debates, p. 88.

[4]Constitution Act, 1867, s. 23(6).

[5]Confederation Debates, p. 36.

[6]Sir Joseph Pope, ed., Confederation, Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act (Toronto: Carswell, 1895), p. 58.

[7]Norman Ward, Dawson's The Government of Canada, 6th ed. (Toronto: University of Toronto Press, 1987), pp. 154-155.

[8]Constitution Act, 1867, s. 23(3) and (4).

[9]C.E.S. Franks, The Parliament of Canada (Toronto: University of Toronto Press, 1987), p. 187.

[10]R. MacGregor Dawson, The Government of Canada, 5th ed., revised by Norman Ward (Toronto: University of Toronto Press, 1970), p. 280. Although Macdonald spoke of the Senate as the "House which has the sober second-thought in legislation," he felt it would "never see itself in opposition against the deliberate and understood wishes of the people." Confederation Debates, pp. 35-36.

[11]Constitution Act, 1867, s. 27.

[12]This reply was delivered by the Earl of Kimberley. See Alberta, Legislative Research Services, "The Canadian Senate" in Alberta, Committee on Senate Reform, p. 66; and Eugene Forsey, "Appointment of Extra Senators under Section 26 of the British North America Act," Canadian Journal of Economics and Political Science (May 1946): 162. In a memorandum dated January 2, 1874, Mackenzie outlined the two reasons which in his view warranted his request for the extra Senators: (1) the "fair equilibrium" between the two political parties which should exist in the Senate had been seriously disturbed; and (2) the government needed the appointments to give it "able advocates" in the Senate. Forsey notes that even if Mackenzie had got his six Senators, he still would have been in a minority in the Senate. See Forsey, pp. 161-164; and Forsey, "Alexander Mackenzie's Memoranda on the Appointment of Extra Senators, 1873-4," Canadian Historical Review (1946): 189-194.

[13]Kunz, p. 357.

[14]"'It is a tough country to govern'," Globe and Mail, 20 June 1990, p. A13.

[15]Technically, on September 27, 1990, on the Governor General's recommendation, the Queen issued Letters Patent directing the Governor General to add eight members to the Senate. Acting under the authority of these Letters Patent, the Governor General then issued Summonses appointing the extra Senators.

[16]"Violating the basic principles of democracy," Globe and Mail, 28 September 1990, p. A15.

[17]"'The battle is on,' MacEachen says," Toronto Star, 28 September 1990, p. A3.

[18]The actions are: Leblanc v. Canada - Ontario Court of Justice (General Division); Case on Reference in the Matters of the Constitutional Question Act, sections 26, 27 and 28 of the Constitution Act, 1867, and the appointment of additional members of the Senate pursuant to section 26 of the Constitution Act, 1867 - British Columbia Court of Appeal; Decore et. al. v. The Queen and Mulroney - Federal Court of Canada (Trial Division); Weir v. Attorney General of Canada - Court of Queen's Bench of New Brunswick (Trial Division); and Singh v. The Queen, Ontario Court of Justice (General Division).

[19]"Ontario to intervene in challenges," Globe and Mail, 18 October 1990, p. A6.

[20]Leblanc v. Canada, [1990] O.J. No. 1887.

[21]Ibid.

[22]Ibid.

[23]Ibid.

[24]Weir v. Attorney General of Canada, decided in the New Brunswick Court of Queen's Bench on November 20, 1990, Stevenson J. (unreported), p. 15.

[25]Ibid., p. 17.

[26]Ibid.

[27]In the Matter of the Constitutional Question Act, "Case on Reference," Schedule.

[28]Constitution Amendment, 1987, s. 2. Any appointment had to "be acceptable to the Queen's Privy Council for Canada." For comments by the Ontario Legislature's Select Committee on Constitutional Reform on the provisions of the Meech Lake Accord pertaining to the Senate, see Ontario, Legislative Assembly, Select Committee on Constitutional Reform, Report on the Constitution Amendment 1987 (Toronto: The Committee, 1988), pp. 27-29, 38-42, and 50-51.

[29]1990 Constitutional Agreement, part 3(2), in First Ministers' Meeting on the Constitution, "Final Communiqué," 9 June 1990.

[30]S.A. 1989, c. S.-11.5. The constitutionality of ordinary legislation (as opposed to a constitutional amendment) for the election of Senators has been questioned. See, for example, Canada, Parliament, Senate, Debates: Official Report, 34th Parliament, 2d Session (20 December 1989): 958 (Sen. Lowell Murray); and Andrew Heard, "Electing the senator: Alberta went beyond its powers," Globe and Mail, 7 November 1989, p. A7.

[31]In a press release, the Prime Minister said that "the agreement signed in Ottawa on June 9 is an important step in accelerating the process of Senate Reform." He continued: "The extraordinary procedure by which Mr. Waters was selected was also intended to advance the cause of Senate Reform, which is why I believe it is important that this unique appointment be made." Canada, Office of the Prime Minister, "Appointment to the Senate," Release, 11 June 1990, p. 1.

Mulroney was reported as saying that the appointment was made on the understanding that there would be no more Senate elections for five years, pending the report of the national commission on Senate Reform to be established under the 1990 Constitutional Agreement. Premier Getty has denied such an agreement was made. See, for example, "Waters sworn in as senator," Edmonton Journal, 20 June 1990, p. A1; and Alberta, Legislative Assembly, Hansard, 22nd Legislature, 2nd Session (11 June 1990): 1774.

[32]S.B.C. 1990, c. 70.

[33]"British Columbians to have vote on Senate vacancies," Vancouver Sun, 20 July 1990, p. 1.

[34]Edwards v. A.-G. Can., [1930] A.C. 124.

[35]Ward, p. 157.

[36]Affidavit of Tapishar Sher Singh in Singh v. The Queen, Ontario Court of Justice - General Division, p. 8.

[37]Ibid., p. 10.

[38]A procedural issue that is currently before the courts is whether or not *in camera* meetings of a Senate committee are an unjustifiable violation of freedom of expression, as guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms. "Fed. Crt. can't use Charter to open up Senate meeting," The Lawyers Weekly, 7 September 1990, p. 20.

[39]Ibid., pp. 164-165; Mackay, p. 110; and Alberta, Legislative Research Services, p. 72.

[40]Canada, Parliament, House of Commons, Debates: Official Report, 34th Parliament, 2nd Session (26 April 1990): 10723.

[41]Canada Act 1982 (U.K.), 1982, c. 11, Sched. B.

[42]Canada, Parliament, House of Commons, Votes and Proceedings, 33rd Parliament, 2d Session (22 June 1988): 2974-2975.

[43]Constitution Amendment, 1987, s. 9. S. 13 required the holding of First Ministers' constitutional conferences at least annually to consider among other things Senate Reform.

[44]Alberta, Legislative Research Services, p. 69.

[45]See Ontario, Ministry of the Attorney General, Rethinking the Senate: A Discussion Paper (Toronto: The Ministry, 1990), p. 49; and Gregory Wirick, "Of Warhorses, Pastures and Power: An Interview with Allan J. MacEachen," Parliamentary Government 7:4 (1988): 12.

[46]Annotated Standing Orders of the House of Commons 1989, pp. 237-238 and 466-467; and Alistair Fraser, W.F. Dawson, and John A. Holtby, Beauchesne's Rules and Forms of the House of Commons of Canada, 6th ed. (Toronto: Carswell, 1989), pp. 215-217.

[47]Peter W. Hogg, Constitutional Law of Canada, 2nd ed. (Toronto: Carswell, 1985), p. 201.

[48]Canada, Parliament, Senate, Debates: Official Report, 29th Parliament, 1st Session (11 January 1974): 1481-1482.

[49]Ibid., p. 1483.

[50]Ibid., p. 1484.

[51]Ibid.

[52]Peter C. Dobell, "The New Senate," Policy Options (April 1989): 30. In May 1985, a few months after the Senate had delayed the passage of a borrowing bill, the federal government introduced a resolution to amend the Senate's powers. The resolution would have removed the Senate's absolute veto over bills adopted by the House of Commons. The resolution is reproduced and debated in Canada, Parliament, House of Commons, Debates: Official Report, 33rd Parliament, 1st Session (7 June 1985): 5531-5556.

[53]Ibid., p. 31.

[54]Canada, Parliament, Senate, Debates: Official Report, 33rd Parliament, 2nd Session (19 November 1987): 2215.

[55]Ibid., p. 2216.

[56]Ibid.

[57]Ibid., p. 2217.

[58]Bill C-21, An Act to amend the Unemployment Insurance Act and the Employment and Immigration Department and Commission Act, 2nd Sess., 34th Parl. 38 Eliz. II, 1989 (first reading 1 June 1989); Bill C-28, An Act to amend the Income Tax Act, the Federal-Provincial Fiscal Arrangements and Federal Post-Secondary Education and Health Contributions Act, the Old Age Security Act, the Public Utilities Income Tax Transfer Act, the War Veterans Allowance Act and a related Act, 2nd Sess., 34th Parl. 38 Eliz. II, 1989 (first reading 20 June 1989); and Bill C-62, An Act to amend the Excise Tax Act, the Criminal Code, the Customs Act, the Customs Tariff, the Excise Act, the Income Tax Act, the Statistics Act and the Tax Court of Canada Act, 2nd Sess., 34th Parl. 38 Eliz. II, 1989-90 (first reading 24 January 1990).

[59]Canada, Parliament, Senate, Standing Committee on Banking, Trade and Commerce, Thirteenth Report (Ottawa: The Committee, 1990), p. 215.

[60]"Senators must vote, PM vows," Globe and Mail, 16 October 1990, pp. A1 and A8.

[61]Canada, Parliament, Senate, Minutes of the Proceedings of the Senate, 34th Parliament, 2nd Session (18 October 1990): 1834-37.

[62]Ward, p. 166.

[63]See, for example, Hon. Guy Charbonneau, "A Second Chamber, Not a Secondary One," Canadian Parliamentary Review 8:4 (Winter 1985-86): 17; and Dale Gibson, Address on Abolition of the Senate, in The Canadian Senate: What is to be Done?: Proceedings of the National Conference on Senate Reform, 5-6 May 1988 (Edmonton: University of Alberta Centre for Constitutional Studies, 1989), p. 100.

[64]Ward, p. 161.

[65]Ontario, Ministry of the Attorney General, p. 50.

[66]Ontario, Legislative Assembly, Select Committee on Constitutional and Intergovernmental Affairs, Hansard: Official Report of Debates, 34th Parliament, 2nd Session (30 May 1990): C-40.

[67]Ibid., p. C-41.

APPENDIX

Constitution Act, 1867, ss. 17, 21-36, 39, 51A and 53
Constitution Act, 1982, ss. 38-49

CANADA

A Consolidation of

THE CONSTITUTION ACTS 1867 to 1982

DEPARTMENT OF JUSTICE
CANADA

Consolidated as of October 1, 1989

THE CONSTITUTION ACT, 1867

30 & 31 Victoria, c. 3. (U.K.)

(Consolidated with amendments)

Constitution of Parliament of Canada

17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

The Senate

Number of Senators

21. The Senate shall, subject to the Provisions of this Act, consist of One Hundred and four Members, who shall be styled Senators. (11)

Representation of Provinces in Senate

22. In relation to the Constitution of the Senate Canada shall be deemed to consist of *Four* Divisions:—

1. Ontario;
2. Quebec;
3. The Maritime Provinces, Nova Scotia and New Brunswick, and Prince Edward Island;
4. The Western Provinces of Manitoba, British Columbia, Saskatchewan, and Alberta;

which Four Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by twenty-four senators; Quebec by twenty-four senators; the Maritime Provinces and Prince Edward Island by twenty-four senators, ten thereof representing Nova Scotia, ten thereof representing New Brunswick, and four thereof representing Prince Edward Island; the Western Provinces by twenty-four senators, six thereof representing Manitoba, six thereof representing British Columbia, six thereof representing Saskatchewan, and six thereof representing Alberta; Newfoundland shall be entitled to be represented in the Senate by six members; the Yukon Territory and the Northwest Territories shall be entitled to be represented in the Senate by one member each.

In the Case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in

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(11) As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.) and modified by the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.), and the *Constitution Act (No. 2), 1975*, S.C. 1974-75-76, c. 53.

The original section read as follows:

> **21.** The Senate shall, subject to the Provisions of this Act, consist of Seventy-two Members, who shall be styled Senators.

The *Manitoba Act, 1870*, added two for manitoba; the *British Columbia Terms of Union* added three; upon admission of Prince Edward Island four more were provided by section 147 of the *Constitution Act, 1867*; the *Alberta Act* and the *Saskatchewan Act* each added four. The Senate was reconstituted at 96 by the *Constitution Act, 1915*. Six more Senators were added upon union with Newfoundland, and one Senator each was added for the Yukon Territory and the Northwest Territories by the *Constitution Act (No. 2), 1975*.

Schedule A. to Chapter One of the Consolidated Statutes of Canada. (12)

Qualifications of Senator

23. The Qualifications of a Senator shall be as follows:

(1) He shall be of the full age of Thirty Years:

(2) He shall be either a natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union:

(3) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same:

(4) His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities:

(5) He shall be resident in the Province for which he is appointed:

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(12) As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.), the *Newfoundland Act*, 12-13 Geo. VI, c. 22 (U.K.), and the *Constitution Act (No. 2), 1975*, S.C. 1974-75-76, c. 53. The original section read as follows:

> 22. In relation to the Constitution of the Senate, Canada shall be deemed to consist of Three Divisions:
>
> 1. Ontario;
>
> 2. Quebec;
>
> 3. The Maritime Provinces, Nova Scotia and New Brunswick;
>
> which Three Divisions shall (subject to the Provisions of this Act) be equally represented in the Senate as follows: Ontario by Twenty-four Senators; Quebec by Twenty-four Senators; and the Maritime Provinces by Twenty-four Senators, Twelve thereof representing Nova Scotia, and Twelve thereof representing New Brunswick.
>
> In the case of Quebec each of the Twenty-four Senators representing that Province shall be appointed for One of the Twenty-four Electoral Divisions of Lower Canada specified in Schedule A. to Chapter One of the Consolidated Statutes of Canada.

(6) In the Case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division. (13)

Summons of Senator

24. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

25. Repealed. (14)

Addition of Senators in certain cases

26. If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Four or Eight Members be added to the Senate, the Governor General may by Summons to Four or Eight qualified Persons (as the Case may be), representing equally the Four Divisions of Canada, add to the Senate accordingly. (15)

Reduction of Senate to normal Number

27. In case of such Addition being at any Time made, the Governor General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, to represent one of the Four Divisions until such Division is represented by Twenty-four Senators and no more. (16)

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(13) Section 2 of the *Constitution Act (No. 2), 1975*, S.C. 1974-75-76, c. 53 provided that for the purposes of that Act (which added one Senator each for the Yukon Territory and the Northwest Territories) the term "Province" in section 23 of the *Constitution Act, 1867*, has the same meaning as is assigned to the term "province" by section 35 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that the term "province" means "a province of Canada, and includes the Yukon Territory and the Northwest Territories."

(14) Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:

> **25.** Such Persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their Names shall be inserted in the Queen's Proclamation of Union.

(15) As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.). The original section read as follows:

> **26.** If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Three or Six Members be added to the Senate, the Governor General may by Summons to Three or Six qualified Persons (as the Case may be), representing equally the Three Divisions of Canada, add to the Senate accordingly.

(16) As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.). The original section read as follows:

> **27.** In case of such Addition being at any Time made the Governor General shall not summon any Person to the Senate except on a further like Direction by the Queen on the like Recommendation, until each of the Three Divisions of Canada is represented by Twenty-four Senators and no more.

Maximum Number of Senators

28. The Number of Senators shall not at any Time exceed One Hundred and twelve. (17)

Tenure of Place in Senate

29. (1) Subject to subsection (2), a Senator shall, subject to the provisions of this Act, hold his place in the Senate for life.

Retirement upon attaining age of seventy-five years

(2) A Senator who is summoned to the Senate after the coming into force of this subsection shall, subject to this Act, hold his place in the Senate until he attains the age of seventy-five years. (18)

Resignation of Place in Senate

30. A Senator may by Writing under his Hand addressed to the Governor General resign his Place in the Senate, and thereupon the same shall be vacant.

Disqualification of Senators

31. The Place of a Senator shall become vacant in any of the following Cases:

(1) If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate:

(2) If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power:

(3) If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter:

(4) If he is attainted of Treason or convicted of Felony or of any infamous Crime:

(5) If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there.

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(17) As amended by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.), and the *Constitution Act (No. 2), 1975*, S.C. 1974-75-76, c. 53. The original section read as follows:

> 28. The Number of Senators shall not at any Time exceed Seventy-eight.

(18) As enacted by the *Constitution Act, 1965*, S.C., 1965, c. 4, which came into force on June 1, 1965. The original section read as follows:

> 29. A Senator shall, subject to the Provisions of this Act, hold his Place in the Senate for Life.

Summons on Vacancy in Senate

32. When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy.

Questions as to Qualifications and Vacancies in Senate

33. If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate.

Appointment of Speaker of Senate

34. The Governor General may from Time to Time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his Stead. (19)

Quorum of Senate

35. Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers.

Voting in Senate

36. Questions arising in the Senate shall be decided by a Majority of Voices, and the Speaker shall in all Cases have a Vote, and when the Voices are equal the Decision shall be deemed to be in the Negative.

The House of Commons

Senators not to sit in House of Commons

39. A Senator shall not be capable of being elected or of sitting or voting as a Member of the House of Commons.

(19) Provision for exercising the functions of Speaker during his absence is made by Part II of the *Parliament of Canada Act*, R.S.C. 1985, c. P-1 (formerly the *Speaker of the Senate Act*, R.S.C. 1970, c. S-14). Doubts as to the power of Parliament to enact the *Speaker of the Senate Act* were removed by the *Canadian Speaker (Appointment of Deputy) Act, 1895*, 2nd Sess., 59 Vict., c. 3 (U.K.), which was repealed by the *Constitution Act, 1982*.

Constitution of House of Commons

51A. Notwithstanding anything in this Act a province shall always be entitled to a number of members in the House of Commons not less than the number of senators representing such province. (29)

Money Votes; Royal Assent

Appropriation and Tax Bills

53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

(29) As enacted by the *Constitution Act, 1915*, 5-6 Geo. V, c. 45 (U.K.)

CONSTITUTION ACT, 1982(79)

SCHEDULE B

CONSTITUTION ACT, 1982

PART V

PROCEDURE FOR AMENDING CONSTITUTION OF CANADA

General procedure for amending Constitution of Canada

38. (1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by

(*a*) resolutions of the Senate and House of Commons; and

(*b*) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces.

Majority of members

(2) An amendment made under subsection (1) that derogates from the legislative powers, the proprietary rights or any other rights or privileges of the legislature or government of a province shall require a resolution supported by a majority of the members of each of the Senate, the House of Commons and the legislative assemblies required under subsection (1).

Expression of dissent

(3) An amendment referred to in subsection (2) shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members prior to the issue of the proclamation to which the amendment relates unless that legislative assembly, subsequently, by resolution supported by a majority of its members, revokes its dissent and authorizes the amendment.

Revocation of dissent

(4) A resolution of dissent made for the purposes of subsection (3) may be revoked at any time before or after the issue of the proclamation to which it relates.

Restriction on proclamation

39. (1) A proclamation shall not be issued under subsection 38(1) before the expiration of one year from the adoption of the resolution initiating the amendment procedure thereunder, unless the legislative assembly of each province has previously adopted a resolution of assent or dissent.

Idem

(2) A proclamation shall not be issued under subsection 38(1) after the expiration of three years from the adoption of the resolution initiating the amendment procedure thereunder.

Compensation

40. Where an amendment is made under subsection 38(1) that transfers provincial legislative powers relating to education or other cultural matters from provincial legislatures to Parliament, Canada shall provide reasonable compensation to any province to which the amendment does not apply.

Amendment by unanimous consent

41. An amendment to the Constitution of Canada in relation to the following matters may be made by proclamation issued by the Governor General under the Great Seal of Canada only where authorized by resolutions of the Senate and House of Commons and of the legislative assembly of each province:

(*a*) the office of the Queen, the Governor General and the Lieutenant Governor of a province;

(*b*) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;

(*c*) subject to section 43, the use of the English or the French language;

(*d*) the composition of the Supreme Court of Canada; and

(*e*) an amendment to this Part.

Amendment by general procedure

42. (1) An amendment to the Constitution of Canada in relation to the following matters may be made only in accordance with subsection 38(1):

(*a*) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;

(*b*) the powers of the Senate and the method of selecting Senators;

(*c*) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;

(*d*) subject to paragraph 41(*d*), the Supreme Court of Canada;

(*e*) the extension of existing provinces into the territories; and

(*f*) notwithstanding any other law or practice, the establishment of new provinces.

Exception

(2) Subsections 38(2) to (4) do not apply in respect of amendments in relation to matters referred to in subsection (1).

Amendment of provisions relating to some but not all provinces

43. An amendment to the Constitution of Canada in relation to any provision that applies to one or more, but not all, provinces, including

(*a*) any alteration to boundaries between provinces, and

(*b*) any amendment to any provision that relates to the use of the English or the French language within a province,

may be made by proclamation issued by the Governor General under the Great Seal of Canada only where so authorized

by resolutions of the Senate and House of Commons and of the legislative assembly of each province to which the amendment applies.

Amendments by Parliament

44. Subject to sections 41 and 42, Parliament may exclusively make laws amending the Constitution of Canada in relation to the executive government of Canada or the Senate and House of Commons.

Amendments by provincial legislatures

45. Subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province.

Initiation of amendment procedures

46. (1) The procedures for amendment under sections 38, 41, 42 and 43 may be initiated either by the Senate or the House of Commons or by the legislative assembly of a province.

Revocation of authorization

(2) A resolution of assent made for the purposes of this Part may be revoked at any time before the issue of a proclamation authorized by it.

Amendments without Senate resolution

47. (1) An amendment to the Constitution of Canada made by proclamation under section 38, 41, 42 or 43 may be made without a resolution of the Senate authorizing the issue of the proclamation if, within one hundred and eighty days after the adoption by the House of Commons of a resolution authorizing its issue, the Senate has not adopted such a resolution and if, at any time after the expiration of that period, the House of Commons again adopts the resolution.

Computation of period

(2) Any period when Parliament is prorogued or dissolved shall not be counted in computing the one hundred and eighty day period referred to in subsection (1).

Advice to issue proclamation

48. The Queen's Privy Council for Canada shall advise the Governor General to issue a proclamation under this Part forthwith on the adoption of the resolutions required for an amendment made by proclamation under this Part.

Constitutional conference

49. A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within fifteen years after this Part comes into force to review the provisions of this Part.

UPDATE, October 1992, taking account of the Charlottetown Agreement

INTRODUCTION

This update highlights some of the legislative and judicial developments pertaining to the Senate since the release of the Current Issue Paper in November 1990. As well, it addresses the following question: how would the Charlottetown Agreement of August 28, 1992 affect the issues raised by these developments?

LEGISLATIVE AND JUDICIAL DEVELOPMENTS

In its review of the Senate's legislative role, the Current Issue Paper discusses the controversy over Bill C-62, the government bill imposing the goods and services tax. As noted in the Paper, in September 1990 the Senate's Banking Committee recommended that the tax be killed. The day after the Committee's report was tabled the Prime Minister, asserting the supremacy of the elected House of Commons, invoked section 26 of the *Constitution Act, 1867* to appoint eight extra Senators. This section states that by special direction of the Queen, four or eight members may be added to the Senate on condition that each of the four "divisions" (Western Provinces, Ontario, Quebec, Maritime Provinces) is increased equally; however, if additional Senators are so appointed, vacancies cannot be filled until a division returns to its complement of 24. This mechanism is the only "safety valve" provided in the Constitution for breaking a deadlock between the two Houses, as the Senate has an absolute veto over all legislation passed by the House of Commons.

Two-and-a-half months later (in December 1990), the expanded Senate passed Bill C-62.[1] At that time several court challenges had already been launched against the enlargement of the Senate. These challenges have subsequently proven unsuccessful in the Ontario, British Columbia, and New Brunswick Courts of Appeal. An action launched by Liberal Members of the Alberta Legislature in the Federal Court of Canada against the extra appointments was not pursued as the Government of Alberta initiated a court reference on the constitutionality of the goods and services tax.[2]

The applicant in one of the above actions was a lawyer in private practice in Guelph, Ontario, named T. Sher Singh. Mr. Singh also sought a declaration that the appointment of former Nova Scotia Premier John Buchanan to the Senate -- a completely separate matter -- was void as contrary to s. 32 of the *Constitution Act, 1867*. S. 32 states that vacancies can only be filled by "fit and qualified" persons. This submission against the "fitness" of Buchanan has since been rejected by the Ontario Court of Appeal.[3]

As explained in the Current Issue Paper, the appointive nature of the Senate has meant that very few government bills are rejected or substantially amended by the Senate. One such occasion (although technically not a rejection) took place in January 1991 when the Senate failed to pass the government's controversial abortion bill (Bill C-43). Under the rules of the Senate, the 43-43 vote on the motion for third reading meant the defeat of the bill.[4]

IMPACT OF THE CHARLOTTETOWN AGREEMENT

Legislative Powers of Senate

Under the Charlottetown Agreement, there would be four categories of legislation:

(1) Revenue and expenditure bills ("Supply bills");

(2) Legislation materially affecting the French language or French culture;

(3) Bills involving fundamental tax policy changes directly related to natural resources; and

(4) Ordinary legislation (any bill not falling into one of the first three categories).

The House of Commons would not be able to override the defeat by the Senate of a bill in categories '2' or '3'. In other words, the Senate would have an *absolute* veto over such legislation. It would have a 30-day *suspensive* veto, however, over supply bills. In the case of ordinary legislation, defeat or amendment would trigger a joint sitting with the Commons.[5]

How would a bill similar to the one imposing the goods and services tax be categorized under the Charlottetown Agreement? The Agreement explicitly states that the definition of supply bills should exclude fundamental policy changes to the tax system, such as the goods and services tax. Fundamental tax policy changes will thus apparently fall under either category '3' or '4'. Category '3' has yet to be precisely defined, which affects the definition of category '4'.

With regards to another abortion bill, it would be classified as ordinary legislation. Accordingly, it could not be killed by the Senate.

Deadlock with House of Commons

The Charlottetown Agreement seeks to address the problem of deadlock between the two Houses in a manner very different from that available under the existing Constitution. In the case of revenue and expenditure bills, there could not be a deadlock, as the Senate would have a suspensive veto only. If the bill were defeated or amended by the Senate, it could be repassed by a majority vote in the Commons on a resolution.

Similarly, deadlock would not be possible where the Senate had defeated or amended ordinary legislation. In such cases, a joint sitting with the House of Commons would be triggered, at which a simple majority vote would determine the outcome of the bill. Joint sittings would also be held if *any* bill initiated and passed by the Senate were amended or rejected by the Commons.

As noted earlier, the Senate would have an absolute veto over legislation materially affecting the French language or French culture, and bills involving fundamental tax policy changes directly related to natural resources. The Charlottetown Agreement does not prescribe any deadlock-breaking mechanism in these instances.

FOOTNOTES

[1] Canada, Parliament, Senate, *Minutes of the Proceedings of the Senate*, 34th Parliament, 2nd Session (13 December 1990): 1998.

[2] See *Singh v. Canada; Leblanc v. Canada* (1991), 3 O.R. (3d) 429; *Reference re ss. 26, 27, and 28 of Constitution Act, 1867* (1991), 53 B.C.L.R. (2d) 335; and *Weir v. Canada (Attorney General)*, [1991] N.B.J. No. 820. The separate actions initiated in Ontario by ten Liberal Senators and Guelph lawyer T. Sher Singh were combined at the Court of Appeal level. Information on the status of the action launched by Liberal Members of the Alberta Legislature was obtained in a telephone interview conducted by Mary Hanson, Reference Librarian, Ontario Legislative Library with Peter Taylor, Research Officer, Office of Lawrence Decore, Leader of Liberal Party of Alberta, Edmonton, 15 September 1992.

[3] (1991), 3 O.R. (3d) 429 at 440.

[4] Ibid. (31 January 1991): 2238-2239.

[5] Multilateral Meetings on the Constitution, *Consensus Report on the Constitution*, Final Text, Charlottetown (28 August 1992), item 12.